IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-~~1781~~ 1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,
Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,
Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,
Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF LAWYERS FOR McGOVERN, *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND OF MOTION FOR SUMMARY REVERSAL OR, IN THE ALTERNATIVE, FOR EXPEDITED CONSIDERATION ON THE MERITS WITH BRIEF ATTACHED

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Lawyers for McGovern

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OCTOBER TERM, 1971

No. 71-1731

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

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NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

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Amicus Curiae, Lawyers for McGovern, respectfully moves pursuant to Rule 42 of this Court, for leave to file the attached Brief in Support of the Petition for Writ of Certiorari and Motion for Summary Reversal, or in the Alternative for Expedited Consideration on the Merits. (Counsel for petitioners and counsel for Nassau County have consented to the filing of this *amicus* brief and only the State of New York has refused to consent to its filing.) Lawyers for McGovern is an independent political committee formed under Article 13 of the New York State Election Law for the purpose of promoting the candidacy of George S. McGovern for the Democratic nomination for President. It is extremely concerned about the effect of Section 186 of New York's Election Law upon the qualification of approximately 500,000 young voters aged 18 to 21 who would be disenfranchised in the coming Presidential primary election to be held in New York State on June 20, 1972 if the Second Circuit's judgment were allowed to stand. It believes it can assist the Court in consideration of the Petition by submitting facts on the impact of the Second Circuit's decision on the right to vote of the 18 to 21 year old group and by pointing out to the Court recent court decisions on the problem of party raiding. It also supports Petitioners' request for immediate relief so that the eligible voters in the State may participate in this crucial election.

Wherefore *amicus* requests that the Court grant it permission to file the attached Brief in Support of the Petition for Writ of Certiorari and Motion for Summary Reversal,

or in the Alternative for Expedited Consideration on the Merits.

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REASONS FOR GRANTING THE WRIT AND FOR SUMMARILY REVERSING THE DECISION OF THE COURT BELOW

I.

The Decision Below Is in Violation of the First, Fourteenth, and Twenty-Sixth Amendments.

This Court has made clear that the "right of suffrage is a fundamental matter in a free and democratic society." *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.*

In recent years, there has been a great expansion in the right to vote. Congress passed the Voting Rights Amendments of 1970, P.L. 91-285, 84 Stat. 314, lowering the minimum age of voters in both state and federal elections from 21 to 18. On December 21, 1970, this Court upheld the validity of the law insofar as it applied to federal elections. *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Congress immediately proposed the Twenty-Sixth Amendment to lower the age of voting in state elections to 18 years as well. It was submitted to the states on March 23, 1971. The requisite number of states quickly ratified the Amendment and by July 7, 1971, it came into force.

Thus in the past two years the federal government and the state governments as well have joined their efforts in expanding and protecting the right of 18 year old citizens to vote. For a restrictive state voting law to be applied

in such a way as to deny this new class of voters the right to participate in the Presidential primary would be to undercut all these recent efforts to expand the suffrage to this group.

Our investigations have indicated that there are at present in New York State approximately 500,000 eligible voters between the ages of 18 and 21 who would not be permitted to vote in the June 20, 1972 Presidential primary if the Second Circuit's decision is allowed to stand.* These young persons may be otherwise fully eligible and eager to vote in the coming primary. However, a tortured reading of Section 186 of the Election Law would bar them and others (lifelong members of one party who have changed the county of their residence within the state and wish to continue their party affiliation and voters moving into the state who wish to join the party of their choice) from participating in this crucial election.

The entire nation is concerned about enlisting our youth in the democratic process and insuring that they work "within the system" for a just and equitable society. Would not the 500,000 young persons barred from the coming election have some cynical thoughts about a process that keeps them from voting in this most important elec-

* The figure is determined as follows: In New York City there are approximately 385,000 eligible voters between the ages of 18 and 21. Only 127,400 registered to vote before October 2, 1971 leaving 257,600 ineligible to vote in the June primary under the Second Circuit's interpretation of Section 186. Calls to election boards throughout the state indicate the ratio elsewhere is approximately the same, e.g., Broome County (12,000 eligible; 3,966 registered); Oneida County (13,400 eligible; 4,395 registered) and Onondaga County (27,600 eligible; 9,500 registered). Since New York City's population is approximately half that of the state, we have doubled the New York City figures to estimate the total number disenfranchised.

tion on the basis of a law, purportedly preventing party raiding, that has nothing to do with their situation?

The court's decision below upheld the validity of Section 186, a provision which is the most drastic means possible to deal with the problem of party raiding. The law must be declared invalid for at least four reasons:*

(1) The evil it was designed to meet—party raiding—is not an evil at all and the law cannot be upheld on its own rationale.

(2) Even if it were legitimate to try to prevent party raiding, the means chosen by New York State casts too wide a net and restricts the votes of too many persons not trying to switch parties in any way.

(3) The law is contrary to the letter and the spirit of the Twenty-Sixth Amendment.

(4) The law amounts to an additional durational residence requirement beyond the term permitted by this Court in *Dunn* v. *Blumstein*, 92 S. Ct. 995 (March 21, 1972).

Each of these points will be discussed in order.

A. *Party Raiding*

The chief reliance of the Second Circuit was on *Lippitt* v. *Cipollone*, 40 LW 3334 (January 17, 1972) where this Court affirmed without opinion a decision of the Northern District of Ohio upholding a Ohio law which barred a *candidate* from switching parties for four years. The law, Ohio Rev. Code §3517.013 et seq. provides that "[no] per-

* Petitioners' brief sets forth very well the invalidity of the law under the First Amendment in terms of its violation of political associational rights and the right to travel.

son shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." The District Court upheld the validity of the law stating that it seeks "to prevent 'raiding' of one party by members of another party and to preclude candidates from '. . . altering their political party affiliations for opportunistic reasons.'" 40 LW 3334.

However, the *Lippitt* decision did not involve voters in any way. There may well be valid reasons for keeping certain restrictions on candidates who wish to switch parties but nothing in the *Lippitt* opinion would justify restrictions on *voter* participation. A recent decision by a three judge court in Illinois makes this point clear:

> "The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so." *Bendinger* v. *Ogilvie*, 335 F. Supp. 572, 576 (N.D. Ill. 1971).

In a case arising in South Carolina, a three judge federal court declared invalid a state law restraining voters

from making party changes which were less restrictive than those involved in the instant case. See *Gordon* v. *Executive Comm. of Democratic Party of City of Charleston*, 335 F. Supp. 166 (D. S. Car. 1971). A South Carolina law would not permit any voter to participate in a primary election if he had voted in a different party's primary election within the same year. The District Court held that one year was "such a lengthy disqualification [as to be] an unconstitutional limitation upon the voter's freedom of the ballot." 335 F. Supp. at 168.

The District Court equated the restriction with durational residence requirements which had been condemned as unconstitutional limitations on a citizen's right of suffrage:

> "We can perceive no basic difference between a durational residence restriction and one which, using a like durational standard, bases the restriction upon the manner in which one had previously voted. No sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional. Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted." 335 F. Supp. at 169.

In a similar case in the Seventh Circuit, *Pontikes* v. *Kusper*, —— F. Supp. —— (No. 71 C 2363, N.D. Ill. March 9, 1972) a three judge court in Illinois declared unconstitu-

tional a state law prohibiting any person from voting in a primary "if he shall have voted . . . at a primary . . . of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held. . . . " Ill. Rev. Stat. Section 7-43. The court said:

> "The plaintiffs' attack against section 7-43(d) is grounded upon both the right of association and the right to vote. We agree that the 'twenty-three month rule' substantially burdens plaintiffs' right to vote in derogation of Article I, §2 of the Constitution. Those who have voted in the March 1971 primary of one party are now deprived of the right to vote in the March 1972 primary should they choose to switch parties at this time. Even voters eligible to vote in any primary this March are affected since they are forced to choose between their right to vote and their right to freely affiliate within the twenty-three month period following the election."

The court commented on the question of "raiding:"

> "The interest which section 7-43(d) is claimed to protect is the state's interest in guarding against any distortions of the electoral process in general and in maintaining the integrity of the two-party system in particular. The statute serves these interests by preventing a practice known as 'raiding.' 'Raiding' occurs when members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. But the statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If section

7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding of one party's primary by members of another party, or because of massive dissatisfaction with the prevailing policies of an existing party. The state's interest upon which this statute is grounded could be characterized as 'compelling' only if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger than the danger to constitutionally protected rights however often it occurs. There is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation. Forty-four states do not impose post-election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system."

The only case found that supports the Second Circuit's decision on the party raiding point is *Fontham* v. *McKeithen*, 336 F. Supp. 153 (E.D. La. 1971). That case upheld both the Louisiana durational residence requirement of one year and in one paragraph of its opinion upheld a six-month suspension of voter eligibility upon change of party affiliation. But the court's decision is directly counter to this Court's decision in *Dunn* v. *Blumstein, supra.* Judge Wisdom in dissent anticipated this Court's ruling in *Dunn* and said further about the six-month eligibility period:

"The waiting period is not well suited to keep malicious cross registrants out because, if they are truly bent on conquest, they need only plan ahead. A member of one party who wishes to vote for the weakest of the other party's primary candidates may still, even in Louisi-

ana, change his party affiliation six months in advance of the primary and cast his subversive vote. Louisiana's waiting period may tend to discourage fraudulent behavior since few voters are foresighted enough to conceive their scheme before election time. But the compelling interest test cannot be satisfied by the simple showing that a statutory scheme is conducive to an important state interest. The statute must provide strong assurance both that the discrimination it encompasses is necessary to accomplish the state's important purpose and that the statute does in fact accomplish that purpose. Here, the state has offered no evidence to demonstrate that the six month waiting period is any more than a rough, easily circumvented device which may reduce badly motivated crossovers, but only at the expense of the right to vote of countless other well-meaning citizens." 336 F. Supp. at 174.

Judge Wisdom continued:

"Louisiana's waiting period thus has the practical effect of locking in party members if they should decide that they prefer the candidates of another political party. This effect can be characterized as promoting the 'stability' of political parties. But our Constitution, happily, is more solicitous of the voter's right to cast his ballot for whomever he pleases than of the uncertain advantages to be gleaned from well-managed, well-structured political parties. It requires legislation which impairs a voter's right to vote for the candidate of his choice to be tested by the stringent compelling interest standard when other voters preserve their freedom to select their preferred candidate, as independent voters do in Louisiana. The compelling inter-

est test is appropriate because the discrimination is a telling deterrent to the First Amendment freedom to associate with others for the advancement of political beliefs." *Ibid.* at 174-75.

These cases make clear that party raiding, if an evil at all, does not justify inhibiting the right to vote. Accordingly, a law such as Section 186 whose sole purpose is to prevent raiding is unconstitutional.

B. *Least Drastic Means Test*

As Judge Wisdom pointed out in the *Fontham* case, party raiding laws which unduly restrict the franchise are an "unconstitutionally imprecise means of accomplishing the state's objective." Even if this Court upheld the proposition that voters from one party should not be permitted to cross-over at will to vote for candidates in another party, Section 186 does not accomplish this purpose in a constitutionally permissible way. For the law would prohibit from voting in a primary election (for a period of up to fourteen months) not only cross-over voters but the following groups as well:

(1) newly registered voters who never belonged to any political party and are making their first choice of party.

(2) lifelong members of one party who have changed the county of their residence within the state and wish to continue their party affiliation.

(3) voters moving into the state who wish to join the party of their choice.

It is fair to say that Section 186 is the most drastic means devised by the state to meet the problem of party raiding. As such it cannot be permitted to stand.

C. *Twenty-Sixth Amendment*

The Twenty-Sixth Amendment specifies that the "right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The Amendment expresses a distinct national policy to bring 18 to 21 year olds into the electoral process. Any restrictive state laws that effectively "abridge" this group's right to vote are in contravention of the express words of the Amendment.

It is plain that the chief effect of Section 186 is to disenfranchise this new group of voters numbering approximately 500,000. To enforce the law against them to deprive them of the right to vote in the June primary would be to undermine the purpose and the words of the new Amendment.

D. *Dunn v. Blumstein*

On March 21, 1972 this Court decided *Dunn* v. *Blumstein*, 92 S. Ct. 995 (1972). That decision declared unconstitutional the one year durational residence requirement of Tennessee and the three month residence requirement of the local county. The Court rejected the idea that residence requirements were necessary to prevent fraud in an election or to insure that knowledgeable voters participate in the franchise:

> "As devices to limit the franchise to minimally knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some

citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." 92 S. Ct. at 1012.

The District Court in South Carolina in the *Gordon* case saw quite clearly that the ban on cross-over voting amounted to an additional residence requirement beyond that established by state law. From the perspective of the voter, durational restrictions may be less inhibiting than the ban imposed by Section 186. A new voter moving into the state on October 3, 1971 could not participate in party elections or affairs until February of 1973. Few if any states impose such a long residence requirement. If this Court felt that a 90 day county residence requirement was too long a restriction on the franchise, how can a fourteen month restriction be upheld?

II.

Immediate Relief Is Required.

For the reasons specified in the petition for certiorari there is a compelling need for immediate relief. Registration for the June 20, 1972 primary closes on May 20, 1972. Thus relief must be afforded before that date for this Court's decision to be meaningful. Otherwise hundreds of thousands of voters may be barred from participating in the primary on the basis of a law which may later be declared unconstitutional. The New York State authorities have never asserted that they cannot process the new voters who seek to register before May 20, 1972 or to enroll those new voters who registered previously for the party of their choice.

To effectuate the Constitution's most recent amendment and this Court's recent decision in *Dunn* v. *Blumstein*, the Second Circuit's decision must be reversed and the decision of the District Court reinstated. In reinstating the District Court's decision, this Court's mandate should make clear that all voters ages 18-21 and others who are ineligible for the June 20, 1972 primary solely because they were not registered on October 2, 1971, must be allowed to register and participate. The Assistant Attorney General handling this case for the State of New York has informed one of the attorneys filing this brief that the State of New York's position is that a reinstatement of the District Court opinion would only make the four petitioners in this case eligible to vote in the primary.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted and the decision of the court below should be summarily reversed, or, in the alternative the matter scheduled for expedited consideration on the merits.

Respectfully submitted,

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